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NO. 80-360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MIDESSA TELEVISION COMPANY, INC. ET AL,
Petitioners,

v.

MIDLAND TELECASTING COMPANY,
Respondent.

On Fetition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the exercise of federal antitrust jurisdiction over a cable television system's failure to carry to its subscribers a local broadcaster's signal is compatible with the Communications Act of 1934 and the First Amendment.

2. Whether a business decision by joint venturers owning a cable television system to refuse to carry their competitor's television signal is a "restraint of trade or commerce" within the meaning of the Sherman Act.

3. Whether a Court of Appeals should address claims under the Clayton Act that were not addressed by the trial court.

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CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

In addition to the provisions quoted in the Brief of Petitioner, Respondent would list the following, the pertinent portions of which will be quoted in full in the Appendix to this Brief.

Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. § 2.

Communications Act of 1934, 48 Stat. 1087, as amended, 47 U.S.C. § 313(a).

Selected provisions of Title 47, Code of Federal Regulations.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Midland Telecasting Co., respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit in this case. That opinion is reported at 617 F.2d 1141.

STATEMENT OF THE CASE

1. Background

The allegations of plaintiffs' complaint.[1]

Respondent Midland Telecasting Company ("Midland")[2] has been licensed since 1961 to broadcast UHF television signals from Midland, Texas, on Channel 18. It was on the air from June 8, 1969, through March 16, 1971, and from March 26, 1973, through October 15, 1974.

Petitioners Midessa Television Company, Inc. ("Midessa") and Doubleday Broadcasting Company, Inc. ("Doubleday") operate VHF television stations in the Midland-Odessa, Texas, area and are, respectively the NBC and ABC affiliates in that market. They, Petitioners Hodge Enterprises and J. Edward Hodge (which own and operate theaters in Midland and Odessa), and Petitioner Cablecom-General, Inc. (which is in the business of owning and operating cable systems) formed Petitioner Community Cablevision Company of Odessa ("CCC") in 1968 as a joint venture.[3]

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1. On review of an Order dismissing a claim for its supposed failure to state a claim upon which relief can be granted, the allegations in plaintiff's complaint should be taken as true. City of Lafayette v. Louisiana Power & Light Company, 435 U.S. 389 (1978). The statement of background facts is therefore drawn directly from plaintiff's complaint. It might be noted that many of the allegations were not denied by one or more of the defendants. Any facts supported by defendants' admissions or the findings of fact in the trial court will be noted in the margin.

2. Midland was plaintiff in the trial court, and will occasionally be referred to as "plaintiff" in this brief.

3. See Answer of CCC to the Third Amended Complaint.

CCC was created for the express purpose of obtaining a franchise for, constructing, and operating a cable television system in Odessa. Before its conception, the several Petitioners had actively competed with one another for such a franchise. Rather than leave the spoils to the successful competitor, however, Petitioners agreed to drop the competitive mantle, form CCC, and share in the cable operation. CCC was successful in obtaining the franchise. It carried the broadcast signals of the broadcast Petitioners and two other television stations, one of which was an independent station from Dallas.[4]

From 1969 forward, Midland requested that CCC carry its UHF signal on the cable. Under the direction of Petitioners, CCC repeatedly refused to do so—that is, until after this suit was filed in May 1974.[5]

Midland's inability to have its signal carried on Petitioners' cable before that time doomed its broadcasting enterprise in the Midland-Odessa market. By the end of 1971, 36% of the homes in the Midland-Odessa area were serviced by Petitioners' cable. Excluded completely from this market, Midland was unable to generate sufficient advertising revenue to keep its UHF station afloat.

By effectively driving Midland out of business, Petitioners through CCC achieved their anticompetitive goal. Midland accordingly sought treble damages and attorneys' fees. Although it suffered an initial setback in the trial

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4. *See generally id.*

5. *See* Finding of Fact (g), in the unreported order, findings of fact, and conclusions of law of the United States District Court for the Western District of Texas (the trial court). The order, findings of fact and conclusions of law are reproduced in the Appendix of Petitioners' Brief at A-17 through A-23 and will be so cited hereinafter.

court, Midland's cause of action was vindicated by the United States Court of Appeals for the Fifth Circuit.

2. FCC Jurisdiction over Cable TV

Contrary to the overly broad conclusion of the Petitioners, Federal Communications Commission ("FCC") jurisdiction over the operation of cable television systems ("CATV") under the Communications Act of 1934 is significantly circumscribed.

a. Legal Authority for CATV Regulation—This Court first delineated the FCC's CATV jurisdiction in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). There the FCC had attempted to prohibit a cable system's retransmission of distant broadcast signals into the licensed contour of local stations. In a 5-4 decision, the Court upheld that exercise of authority. It held, however, that the FCC could regulate CATV only so long as that regulation was "reasonably ancillary" to its regulation of broadcast television under Title III of the Communications Act. 392 U.S. at 178.

On the basis of that decision, this Court recently struck down more ambitious FCC rules. *See FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). There the FCC rules at issue had required each of the largest cable systems to provide for leased access to at least one channel and to carry at least three public television stations. Applying the "reasonably ancillary" test, this Court held that the FCC had exceeded its "circumscribed range of [statutory authority] to regulate cable television." 440 U.S. at____, 99 S.Ct. at 1439.

b. The CATV Regulatory Scheme—The legal precedent shows that FCC authority over CATV is far from complete. Moreover, the FCC has exercised what author-

ity it does have over CATV signal carriage in a far less than comprehensive manner.

The first regulations applicable to all CATV systems were promulgated in 1966. *See Second Report and Order in Docket 14895*, 2 F.C.C.2d 725 (1966). One of the most important of these required cable systems upon request to carry the signals of local stations before the cable systems carried any others.[6] *See* 47 C.F.R. §§ 21.712(c); 74.1033(a); 74.1103(a); 91.559(a) (1967). Subject only to channel capacity, a cable could then carry any signal. The cable system was merely required to notify other stations and the FCC. *See* 47 C.F.R. § 74.1105 (1967). Thus, during the entire time when Midland's signal was first on the air from 1969 to 1971, there was no regulatory impediment to Petitioners' carriage of Midland's signal.[7] Except for other rules related to

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6. In FCC v. Midwest Video Corp., 440 U.S. 689 (1979), this Court distinguished these signal carriage rules from the public access rules, and held that the former requirements "did not amount to a duty to hold out facilities indifferently for public use and thus did not compel cable operators to function as common carriers." 440 U.S. at _____, 99 S.Ct. at 1445 n.16.

7. Section 74.1103(a) of the applicable regulations required a cable system to carry, on request of the stations involved, broadcast stations in a certain priority: first, all stations whose principal contours covered the community in which the cable was located, *see* 47 C.F.R. § 74.1103(a)(1) (1967); second, all stations within whose Grade A contours the cable was located, *see id.* at § 74.1103(a)(2); third, all stations within whose Grade B contours the cable was located, *see id.* at § 74.1103(a)(3); fourth, all stations that had local translators of a certain power, *see id.* at § 74.1103(a)(4).

Petitioners' brief, at pg. 4, characterizes Respondent's signal as "weak." Whether or not Respondent's signal had the characteristics that made carriage by CCC mandatory—and Respondents contends that it did—Respondent vigorously opposes Petitioners' attempt to raise this purely factual question since it was not resolved by the trial court. The important point is that between 1969 and 1971, there was no requirement whatsoever of FCC approval before CCC could commence carrying a given signal.

signal carriage, the FCC did not assume any further control over CATV; it did not regulate rates or entry into the market.

The first approval requirement for signal carriage was not adopted by the FCC until February 2, 1972, and did not become effective until March 31, 1972. *See Cable Television Report and Order,* 36 F.C.C.2d 1 (1972). It read:

> No cable television system shall commence operations or add a television broadcast signal to existing operations unless it receives a certificate of compliance from the Commission.

47 C.F.R. § 76.11(a) (1973).

The signal carriage requirements for local stations were substantially revised so as to make the determination whether a local signal had to be carried turn on more objective criteria than the strength of the signal in question.[8] *See* 47 C.F.R. §§ 76.57(a); 76.59(a); 76.61(a) (1973). At the same time, the FCC clearly indicated that the establishment of such objective criteria would make the issuance of a certificate of compliance a simple,

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8. For example, cable systems operating in a "smaller television market" such as Odessa, had to carry, upon request of the station involved, not only signals of stations within whose Grade B contours the system was located, *see* 47 C.F.R. § 76.59(a)(3) (1973), but also signals of stations licensed to a community whose reference point was within a 35-mile radius of any part of the community served by the cable system (the "specified zone of a television broadcast station" as defined in § 76.5(f)), *see id. at* § 76.59(a)(1), and signals of stations licensed to communities generally considered to be part of the same smaller television market (a "hyphenated market"), *id.* at § 76.59 (a)(4). It is undisputed that Respondent was licensed to serve Midland, that the reference point of Midland was within a 35-mile radius of Odessa, and that Midland-Odessa was a hypenated market.

prompt, and almost ministerial act.[9] Other regulatory requirements—for example, mandatory program origination—were added, but the FCC still exercised no general regulatory control over rates and services through the certificate of compliance process. Indeed, all existing systems were permitted to operate until 1977 without such a certificate. *See* 47 C.F.R. § 76.11(b) (1973).

Quickly, however, the FCC recognized that the certificate process created undesired limitations on the carriage of local signals. Effective December 1, 1973, the FCC permitted addition of certain local signals by a mere registration procedure, thus rescinding its prior approval powers. *See Order,* 38 Fed. Reg. 33,398 (Dec. 4, 1973); 47 C.F.R. § 76.11(a) (1973). For several months before it finally carried Midland's signal, therefore, the Petitioners' cable could have added that signal to its system merely by registering the change without having to obtain

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9. In its report accompanying the issuance of the new rules, the FCC stated:

> Absent special situations or showings, requests consistent with our rules will receive prompt certification. The rules will operate on a 'go, no-go' basis—i.e., the carriage rules reflect our determination of what is, at this time, in the public interest with respect to cable carriage of local and distant signals. We will, of course, consider objections to signal carriage applications and have retained special relief rules, but those seeking signal carriage restrictions on otherwise permitted signals have a substantial burden. Before restrictions are imposed in such cases, there will have to be a clear showing that the proposed service is not consistent with the orderly integration of cable television service into the national communications structure and that the results would be inimical to the public interest. We have during the course of this proceeding fully considered the question of impact on local television service and we do not expect to re-evaluate that general question in individual cases. And, for the same reason, we have no intention of re-evaluating on request of cable systems in individual proceedings the general questions settled in our carriage and exclusivity rules.

36 F.C.C.2d at 46-47.

prior FCC approval. Once again, if anything, they appear to have been required to do so under the FCC signal carriage rules.[10]

The FCC has stated that the purpose underlying its rules about carriage of local signals is to aid local UHF broadcasters like Midland. In its 1972 Cable Report the FCC said:

> All systems must carry, on request, the signals of all stations licensed to communities within 35 miles of the cable system's community. This requirement based on policy considerations similar to those underlying existing carriage rules, is intended to aid stations—generally UHF—whose Grade B contours are limited. In this manner less powerful stations will be able to compete with more powerful stations in the same market more effectively than they could under our old carriage rules; they will be capable of extending their coverage into the area that we have determined is generally necessary for the development of broadcasting stations.

36 F.C.C.2d at 34. The express policy of the FCC thus ran counter to the exclusion of Midland's signal from Petitioners' cable and thus parallel to Midland's antitrust claims.[11]

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10. As noted above, the purpose of this discussion is not to demonstrate conclusively that Petitioners were required to carry Midland's signal, but merely to show how little the approval requirement (when it was in effect) interfered with and how seldom the FCC felt it necessary to oversee the addition of new signals, especially local signals. It is also significant to note that Midland, rather than seeking to enforce the antitrust laws in a manner repugnant to the regulatory scheme, is contending that Petitioners' concerted refusal to deal, if not *per se* unlawful, was unreasonable because it contravened the regulatory requirements of carriage.

11. The FCC's recent action concerning its control over CATV is most telling. The FCC has in fact proposed substantial deregula-

3. Ruling of the Courts Below

Without conducting any review of this regulatory scheme, the trial court signed the findings and conclusions drafted by Petitioner Midessa.[12] Those conclusions held that the CATV regulatory scheme is "pervasive," at least with respect to the "narrow and discrete" question of signal carriage. The conclusions also held that the antitrust laws and the regulatory scheme provided for in the Communications Act are "mutually repugnant." Consequently, the conclusions stated that the regulatory system would not work if Midland were permitted to pursue its antitrust lawsuit. On the basis of these conclusions, the trial court ruled that the Petitioners' conduct is immune

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tion of CATV. *See Notice of Proposed Rulemaking*, 43 Fed. Reg. 30,845 (July 18, 1978). In this notice, the FCC proposed to "eliminate the Certificate of Compliance process" in part because the FCC perceived that this process and others had been subject to "abuse" . . . for anticompetitive or other improper purposes. . . ." *Id.* at 30,846.

12. *See Midland Telecasting Co. v. Midessa Television Co.*, 617 F.2d 1141, 1144 and n.5 (5th Cir. 1980). One of those findings was that defendants were required to seek approval from the FCC before adding Midland's signal to the cable. See Brief of Petitioners at A-18. The preceding section of this brief should demonstrate how erroneous that finding is. Of course, though denominated as a "finding of fact," it is actually a conclusion of law that should have no binding effect on this Court.

Nevertheless, since Midland believes that the existence or absence of a requirement of prior administrative approval is immaterial to the issues presented by this appeal, Midland will assume, for the purpose of its argument, that at all times pertinent to the appeal, it was necessary for CCC to obtain FCC approval before adding Midland's signal. Obviously, if this Court should determine that the requirement of prior administrative approval has some bearing on the question whether Midland has a cause of action under the antitrust laws, then at the very least this case should be remanded for the trial of Midland's claims that Petitioners unlawfully refused to carry its signal at the times when no administrative approval was necessary; to wit, prior to March 31, 1972, and subsequent to December 1, 1973.

from attack under the antitrust laws. Included in the conclusions signed by the trial court were holdings that Midland has no valid claim for Petitioners' failure to seek approval for the carriage of its signal, and that Midland has no standing to sue for violations of the antitrust laws.

The United States Court of Appeals for the Fifth Circuit reversed in *Midland Telecasting Company v. Midessa Television Company*, 617 F.2d 1141 (5th Cir. 1980). Following clear precedent in this Court, the Court of Appeals recognized longstanding judicial reluctance to find repeals of the antitrust laws by implication, *id.* at 1145, and, after a thorough review of the regulatory scheme at issue, found no repugnancy between the FCC carriage rules and antitrust principles, *see id.* at 1148, and no justification for any implied antitrust immunity, *id.* at 1149.

Further, the Court of Appeals recognized that Midland was "the target of the conspiracy" alleged in the complaint, *see id.*, and held that Midland had standing under Section 4 of the Clayton Act, 15 U.S.C. § 15. Since the trial court failed to address the applicability of Section 7 of the Clayton Act, 15 U.S.C. § 18, to the facts alleged by Midland, the Court of Appeals understandably and properly did not rule on that issue.

The only First Amendment claim made by Petitioners in the trial court and in the Court of Appeals concerned the *Noerr-Pennington* doctrine.[13] Because Petitioners made no effort to influence governmental action within the meaning of that doctrine, the Court of Appeals rejected

13. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers v. Pennington, 381 U.S. 657 (1965).

its applicability in this case. *See id.* at 144 n.6. In light of Petitioners' brief it should be emphasized that Petitioners never made any arguments to the trial court or to the Court of Appeals based on editorial discretion or any other First Amendment considerations.

REASONS WHY THE WRIT SHOULD BE DENIED

1. THERE ARE NO IMPORTANT QUESTIONS OF FEDERAL LAW IN THIS CASE THAT HAVE NOT BEEN SETTLED BY THIS COURT.

This Court's decision in *United States v. Radio Corp. of America,* 358 U.S. 334 (1958), is dispositive of this case. There, the FCC had approved an exchange of television broadcast stations. The Justice Department, which had participated in the FCC hearings, sued to enjoin the exchange in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Refusing to accept the argument of Radio Corporation of America ("RCA") that the exchange was immune from antitrust attack, the Court held that neither the Communications Act nor FCC approval of the exchange created such immunity. Here, the Court of Appeals correctly followed the *RCA* decision and found no antitrust immunity for the activities of Petitioners. *See* 617 F.2d at 1148-49.

The Supreme Court's decision in *RCA* rested on two considerations, each of which would alone be dispositive of the immunity issue in this or any other broadcast case. First, the language of the Communications Act itself expresses unequivocally Congress' intention that the Act confer no antitrust immunity on broadcast entities. Second, the legislative history of the Act confirms this

literal reading of the statute: no antitrust immunity whatsoever is to be derived from the Act insofar as broadcasting is concerned.

FCC control over both broadcasting and CATV derives from Title III of the Communications Act. *See FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *United States v. Southwest Cable Co.*, 392 U.S. 157 (1968). An integral part of that title is Section 313(a) of the Act, which begins:

> All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are declared to be applicable to . . . radio [i.e. broadcast] communications.

47 U.S.C. § 313(a).

This plain and unambiguous legislative language alone demonstrates conclusively that no antitrust immunity flows from Title III. Moreover, Section 313(a) goes on to provide:

> Whenever in any suit . . . , civil or criminal, brought under [the antitrust] laws, . . . , any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, *in addition to the penalties imposed by said laws,* may adjudge, order and/or decree that the license of any licensee shall . . . be revoked.

Id. (emphasis added).

In other words, an antitrust court is given powers at least equal to those of the FCC over the broadcast licenses granted by the FCC. Nothing could make it more clear that Congress intended that no immunity from anti-

trust suit be derived from FCC regulation under this legislation.

The legislative history of the Communications Act is equally compelling. In the words of the Supreme Court in *RCA*, that history "reveals that the [FCC] was not given the power to decide antitrust issues as such,[14] and that *Commission action was not intended to prevent enforcement of the antitrust laws in federal courts.*" 358 U.S. at 346 (emphasis added). *A fortiori, CCC's inaction,* induced by a conspiracy between Midland's competitors, *cannot* be the basis for preventing enforcement of the antitrust laws. *RCA* is the definitive construction of the Congressional intent embodied in Title III of the Communications Act: there simply is no implied antitrust immunity for broadcast entities—radio, television or cable.

Nothing in CATV regulation or the particular facts of this case warrants a result different from that reached in *RCA*. Indeed, the factual setting here presents an even weaker case for immunity than the situation in *RCA*.

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14. The Supreme Court's recent decision in the media cross-ownership case, FCC v. National Citizens Committee for Broadcasting, Inc., 436 U.S. 775 (1978), does not suggest anything to the contrary. There the Court upheld the FCC's decision not to require that existing broadcast stations divest any interest in daily newspapers in the station's community despite the FCC's decision to prohibt such common ownership prospectively. At first blush, this might appear to uphold a decision by the FCC on antitrust issues. But that is not the case.

The Court expressly noted that in reaching its respective decisions, the FCC had found that "newspaper-broadcast combinations . . . are not harmful to competition." *Id.* at _____, 99 S.Ct. at 2107. Instead the Court held that the agency decision on divestiture of existing combinations was supported by the rational balancing of two factors: "local diversity" of broadcast origination versus "disruption of the industry" attendant to divestiture. *Id.* at _____, 99 S.Ct. at 2107-08. Even in a case involving divestiture, therefore, the FCC's decision—upheld by the Court—had little to do with antitrust issues.

As noted above, the CATV regulation presently at issue is merely "ancillary" to the *direct* FCC regulation of television broadcasting at issue in *RCA*. In addition, in *RCA* not only were the parties required to seek FCC approval, but the FCC had already approved the conduct at issue; here the Petitioners base their immunity argument on the mere claim that they would have had to seek FCC approval to carry Midland's signal. For these two reasons, there is even less of a basis for finding implied antitrust immunity in this case than there was in *RCA*—and in *RCA* the Supreme Court found none at all.

Unlike the trial court, which did not cite and indeed ignored *RCA* altogether,[15] the Court of Appeals correctly recognized, under *RCA's* unassailable terms, that defendants' antitrust violations carry no immunity from suit by reason of FCC regulation of CATV under Title III of the Communications Act. On this ground alone, the writ should be denied.

Alternatively, if this Court should conclude that the case raises significant legal issues, Midland respectfully submits that these issues should not be decided on as incomplete a record as is present in this case. Rather, the decision should be made after a complete record is built in the trial court on an appeal from a jury trial.

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15. Petitioners' brief, at page 12, weakly characterizes the *RCA* decision as "inapplicable" without explaining why it should be so regarded. Apparently, Petitioners believe that subsequent decisions of this Court have somehow overruled *RCA sub silentio*. This contention is addressed *infra*. It should be noted here, however, that all district court decisions facing the issue to date have followed *RCA* as the controlling precedent. *See* United States v. National Broadcasting Co., 449 F.Supp. 1127 (C.D. Cal. 1978); United States v. CBS, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,327 (C.D. Cal. 1977); First Delaware Valley Citizens Television, Inc. v. CBS, Inc., 398 F.Supp. 917 (E.D. Pa. 1975) (claims under Sherman Act §§ 1 & 2 and Clayton Act § 7).

2. THE COURT OF APPEALS' DECISION IS IN COMPLETE HARMONY WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. The Regulatory System Will Work Effectively If The Antitrust Laws Are Enforced Against CATV Systems in Court.

Contrary to Petitioners' assertions, the Court of Appeals' decision is completely consistent with opinions of this Court issued subsequent to *RCA*. In several recent cases this Court has established some central principles by which consideration of possible antitrust immunity is to be guided.

But legislative intent remains the key; a court must consider whether federal legislation "was intended by Congress to leave [antitrust] supervision" of an industry to an administrative agency. *Gordon v. New York Stock Exhange, Inc.*, 422 U.S. 659, 691 (1975); *accord, Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595 (1976). Here, legislative intent is clear. As the *RCA* decision held, Congress intended that Title III of the Communications Act confer no antitrust immunity on the broadcast industry. *RCA* is thus fully consistent with these most recent holdings in *Gordon* and *Cantor* that legislative intent is dispositive.

If legislative intent is unclear, a court may find that the requisite intent to immunize regulated conduct from antitrust attack is to be implied[16] from the terms of the statute at issue or from the extent of regulation under-

16. No Petitioner has ever claimed, nor did the courts below find, that there is any express legislative immunity conferred upon the antitrust violations of Petitioners.

taken by an agency pursuant to that statute. But even then a court may not do so lightly, for "antitrust immunity is not favored." *United States v. National Association of Securities Dealers,* 422 U.S. 694, 719 (1975).[17] By the Court's own account, it "has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory Act work, 'and even then only to the minimum extent necessary.' " *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 597 (1976), quoting from *Otter Tail Power Co. v. United States,* 410 U.S. 366, 391 (1973); *accord, Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659, 683 (1975).

The trial court made no effort to show how this lawsuit or any other antitrust suit would interfere with the CATV regulatory system; the court's conclusions just say that they would. As the Court of Appeals properly recognized, *see* 617 F.2d at 1145, this is not the stringent showing required to support a finding of immunity.

The trial court relied on an imagined signal carriage approval requirement in reaching the conclusion that the "sophisticated regulatory program of the FCC would not work" if the antitrust laws were applied in this case. As a matter of law, however, an approval requirement alone is insufficient to support immunity.

The most recent Supreme Court decision on immunity, *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976), demonstrates this principle conclusively. There the plain-

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17. This Court recently issued two decisions in which it likewise indicated a steadfast unwillingness to permit expansive interpretations of express legislative antitrust immunities. *See* St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978); National Broiler Marketing Ass'n. v. United States, 436 U.S. 816 (1978).

tiff brought suit alleging that the defendant utility had attempted to monopolize the sale of light bulbs in Michigan by means of a light bulb exchange program. That program had been approved by the Michigan Public Utilities Commission, and the defendant would have had to seek approval from the Commission to abandon it. In the eyes of the Court, that in itself did not immunize the program from antitrust attack. Applying principles of immunity identical to those applied to federal regulation, this Court ruled that Michigan's regulatory program would not be "impaired" by application of the antitrust laws to the defendant's conduct, and held as follows:

> We conclude that neither . . . approval . . . nor the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program.

Id. at 598. Here, the FCC never approved the exclusion of Midland from Petitioners' cable. Thus, there is even less reason for implying any antitrust immunity from the supposed approval requirement alone.

Once again, the leading Supreme Court case on point should be dispositive; no immunity is to be implied from a mere approval requirement (even when that approval requirement exists). Thus, the Court of Appeals, unsurprisingly, found Petitioners' approval requirement argument to be "without merit."[18] *See* 617 F.2d at 1148.

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18. The Court of Appeals, on the authority of Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 224 (1966); *RCA*, 358 U.S. at 352 (1959); and Mid-Texas Communications, Inc. v. American Tel. & Tel., Inc., 615 F.2d 1372, 1380 (5th Cir. 1980), also correctly refused to require Midland to exhaust its administrative remedies before bringing this action.

Out of an abundance of caution, however, we will continue to answer each point in Petitioners' brief. There are two premises in that misguided analysis for the proposition that the regulatory scheme will not work if Midland's antitrust suit is permitted to proceed. First, according to Petitioners, there is some repugnancy between the antitrust laws and the regulatory scheme at issue, a conflict that somehow raises the spectre of inconsistent standards. Second, according to Petitioners, the regulatory scheme is pervasive. Petitioners are wrong on both counts.

(1). There Is No Repugnancy Between FCC Control Over CATV and the Antitrust Laws.

Only a "convincing showing of clear repugnancy between the antitrust laws and the regulatory system" will justify a finding of immunity. *United States v. National Association of Securities Dealers,* 422 U.S. 694, 719-20 (1975). Petitioners, while citing *N.A.S.D.*, do not come close to making the required showing; they merely announce in a conclusory fashion that such repugnancy exists. Since the required clear showing is absent, the Court of Appeals correctly reversed the trial court and held that

> no repugnancy exists between the FCC carriage rules and antitrust principles. If the refusal [to carry Midland's signal] violated antitrust laws, a finding of liability would not undermine or conflict with the regulatory scheme.

See 617 F.2d at 1148. Respondents respectfully submit that Petitioners' argument based on an "irreconcilable conflict," *see* Brief of Petitioner at 14, between the regu-

latory scheme and the antitrust laws is simply without merit.

In fact, as the Court of Appeals found, there is no conflict at all:

> Given the FCC's policy to promote UHF broadcasting, the regulatory and antitrust principles are, in fact, complimentary.

Id. Midland contends that, by refusing to carry its UHF signal, Petitioners violated at the same time both the FCC's CATV regulations requiring carriage of local signals and the antitrust laws. The regulatory scheme and the antitrust laws in this instance are thus virtually coextensive. They are far from "mutually repugnant."

Moreover, in *N.A.S.D.* (a 5-4 decision with the dissenters opposing immunity), on which the Petitioners rely, this Court concluded that statutory authorization for the challenged restrictions on the resale of mutual fund shares was irreconcilable with the principle that such restrictions are *per se* violations of the antitrust laws and held that they were immune from antitrust attack. There is no similar authority in the Communications Act for excluding local stations from cable systems. Consequently, there should be no immunity similar to that found in *N.A.S.D.* for the exclusionary conduct in this case.

Likewise, in *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), on which the Petitioners also rely, this Court rejected a challenge to stock exchange rules fixing commission rates and focused on Section 19 (b)(9) of the Securities Exchange Act of 1934, which authorized the SEC to oversee exchange rules fixing com-

mission rates. The Court concluded easily that "failure to imply repeal [of the antitrust laws] would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates." *Id.* at 691. Once again, there is no similar provision in the Communications Act for FCC supervision of cable exclusion of local television signals. A failure to imply antitrust immunity here would be perfectly proper.

Professors Areeda and Turner put it this way:

> The legislature's purpose in creating a regulatory regime bears on the existence or scope of an antitrust immunity. That purpose will sometimes be clear. Where competition is impossible, regulation is often adopted as a substitute for missing market forces. In such "natural monopolies" regulation is expected to control prices and profits and also to promote efficiency and innovation. But that regulatory premise does not necessarily embrace the achievement of a monopoly in components that could be competitively produced to supply the public utility. Similarly, *the necessity of preventing physical interference among broadcasters does not necessarily compel restraints on the competition of cable television operators.*

1 P. Areeda and D. Turner, Antitrust Law ¶ 223, at 138 (1978) (emphasis added). In essence, what these antitrust scholars are saying is that there is no reason that market forces—and, correspondingly, the application of the antitrust laws—should be supplanted in the regulation of CATV. That is precisely Midland's position here.

As a final matter, it should be clear that nothing in CATV regulation is incompatible with Midland's suit or with the antitrust laws in general. The FCC has made

a determined effort to see that all cable systems carry all local signals. Nothing about that effort is in conflict with the prohibition of the antitrust laws against group boycotts, concerted attempts to monopolize, or mergers that lessen competition, particularly when those laws are sought to be enforced by a local station driven out of business by a cable system's blatant disregard of the FCC regulations designed to protect the local station. There is no necessary repugnancy whatsoever between CATV regulation and the antitrust laws. No immunity should be implied on this ground.

(2). FCC Regulation of CATV Is Not Pervasive.

As noted above, in deciding the implied immunity issue a factor may be "whether [an agency's] exercise of regulatory authority is . . . pervasive." *N.A.S.D.*, 422 U.S. at 730 (1975). Petitioners argue that the regulatory scheme at issue here is complete and pervasive, and cite *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972). Unfortunately for Petitioners, this Court recently distinguished the cited case and held that Congress has conferred on the FCC only a "circumscribed range of power to regulate cable television." *FCC v. Midwest Video Corp.*, 440 U.S. 689, ____, 99 S.Ct. 1435, 1439 (1979). No provision of the Communications Act establishes any extensive FCC authority over CATV; there is no provision of the Act that even speaks to CATV. There is no showing of the requisite pervasiveness of regulatory authority.

The *RCA* decision is precisely on point. Even with respect to broadcasting, the Communications Act creates "no pervasive regulatory scheme." *RCA*, 358 U.S. at 350. Of course, the FCC had attempted to exercise complete

control over the particular exchange of stations at issue in *RCA*—it had approved the exchange. But even this exercise of complete control over the transaction in issue was not deemed by the Court to be an exercise of "pervasive" control.

The FCC's authority over CATV is even less extensive than the regulation of broadcasters that the Court held not to be pervasive in *RCA*. It likewise cannot be deemed pervasive. Immunity should not have been implied from the FCC's restricted control over CATV. The writ therefore should be denied.

B. Midland's Allegation That Defendants Engaged In A Group Boycott By Refusing To Request Administrative Approval For The Carriage Of Plaintiff's Signal States A Valid Cause Of Action Under The Antitrust Laws.

Without raising the issue at *any* stage in the proceedings below, Petitioners in their brief to this Court attempt nebulously to argue "significant constitutional implications," *see* Brief of Petitioner at 19, presumably based on notions of editorial discretion. Midland is appalled at this effort to persuade this Court to decide a constitutional issue that no other court involved in the case has had an opportunity to consider, and Midland is confident this Court will not allow Petitioners to make such an end run around an orderly appellate review process.

Regarding the only First Amendment argument raised below, the Court of Appeals properly held inapplicable the *Noerr-Pennington* doctrine, since the doctrine is based on the need "to protect efforts directed to government officials for the purpose of seeking redress," and no such effort was made here. 617 F.2d at 1144 n.5.

Respondents submit that the Court of Appeals' reasoning was correct and consistent with the decisions of this Court. For example, in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the defendant was sued for having failed to seek approval from the Michigan regulatory commission to abandon its monopolistic light bulb program. The Court would never have reached the immunity issue there if the plaintiff could not in any event have stated a valid claim against the failure to seek an administrative decision. The plaintiff in *Cantor* was permitted to make that antitrust claim; Midland submits that its claim is equally valid here.

Petitioners continue to rely on *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and on *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), which held that an affirmative effort to influence public officials does not violate the antitrust laws. Nowhere, however, has it ever been held that a concerted refusal to deal is exempted from the antitrust laws merely because a decision to deal would require subsequent administrative approval. There is a significant difference between jointly seeking to influence administrative action and jointly refusing to do so. In the case of an effort to influence public decisionmaking, First Amendment rights are exercised, and a decision is reached. When a group of competitors refuse to seek a decision, they do not exercise their First Amendment rights, the decisionmaker is never confronted with the issue, and public policy is never brought to bear on the potential problem.

Likewise, Petitioners in this case, by jointly refusing to seek FCC approval to carry Midland's signal, were not seeking to exercise First Amendment rights but rather

were able "to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp [the] decision-making process." *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 512 (1972).[19] Had the Petitioners here jointly petitioned the FCC to be relieved of any regulatory requirement that CCC had to carry Midland's signal, and were Midland here complaining of such action, then the *Noerr-Pennington* doctrine might give them some solace. But that is not this case. Therefore, Midland's complaint states a valid cause of action, and the writ should be denied.

C. Plaintiff Has Standing To Bring This Antitrust Lawsuit.

The conclusions signed by the trial court say that "plaintiff [Midland] lacks standing to complain . . . of any refusal of the defendants [Petitioners] to carry its signal on the CATV system . . . [because] plaintiff was not in the 'target area' . . . and has not alleged antitrust injury, [i.e.,] the type antitrust laws were intended to

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19. While the FCC regulations provided a procedure by which a broadcaster might seek an order compelling a cable system to carry its signal (*e.g.,* 47 C.F.R. § 74.1109 (1967) and 47 C.F.R. § 76.7 (1973)), it is clear that this procedure was much more complicated and time consuming than the certificate of compliance one and that the regulatory scheme placed the burden of seeking approval of carriage on the cable system rather than the broadcast licensee. In any event, the regulations affirmatively required that where a request for carriage had been made by a broadcaster entitled to carriage, the cable system had to provide the carriage unless it filed a petition for waiver within 15 days of the request. *See* 47 C.F.R. § 76.7(g) (1973). A concerted refusal to invoke administrative action where the applicable regulations command that it be sought is no more immune from antitrust scrutiny than a concerted attempt to invoke administrative action on the basis of false information. *See* Woods Exploration & Producing Co. v. Aluminum Co., 438 F.2d 1286 (5th Cir.), *cert. denied,* 404 U.S. 1047 (1971).

prevent." Brief of Petitioners at A-21. This preposterous conclusion was rejected by the Court of Appeals, which found that

> Midland, under the allegations in its complaint, was the *target* of the conspiracy and as such is an adequate representative of that sector of the economy which is threatened by the alleged anti-competitive acts of the defendants. As such, Midland has standing under section 4 [of the Clayton Act, 15 U.S.C. § 15].

617 F.2d at 1145 (emphasis added.)

A business boycotted by its competitors is well within the "target area" of the boycott; it *is* the target. And the boycotted competitor has standing to sue for damages caused by the boycott under Section 1 of the Sherman Act. This has been an unassailable tenet of private antitrust litigation from the earliest date. *See Montague & Co. v. Lowry,* 193 U.S. 38 (1904); *Klor's Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959).

The same can be said for a suit alleging that a business has deprived a potential or actual competitor of access to a facility, like Petitioners' cable system, essential to effective competition. The excluded competitor has standing to sue for damages caused by the exclusion under Section 2 of the Sherman Act. *See, e.g., Hecht v. Pro-Football, Inc.,* 570 F.2d 982, 993 n.44 (D.C. Cir. 1977), *cert. denied,* 436 U.S. 956.

The parameters of standing under Section 7 of the Clayton Act have not been so clearly delineated. Midland submits that when a competitor is precluded access to a facility that is created by a horizontal merger of all of the remaining competitors and is essential to effective

competition, the excluded competitor has standing to sue the merging competitors. The merger enables the merging parties to destroy the competition of the excluded competitor. That excluded competition is the target of the merger. And the excluded competitor has standing to sue under Section 7. *See Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 985 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978).

The cases cited by Petitioners in support of their standing argument in no way preclude standing for Midland here. Petitioners rely first on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). There the plaintiff, an operator of bowling centers, sued the defendant under Section 7 of the Clayton Act for merging with a competitor and thereby enabling that competitor to remain in business to the detriment of the plantiff. It can be seen immediately that the case has no relevance to the garden variety Sherman Act counts of plaintiff's complaint, on which plaintiff should have indisputable standing. Even as to plaintiff's Section 7 count, *Brunswick* does not preclude standing here. There, the only injury plaintiff sustained as a result of the merger was increased competition from the merged company. Here, Midland complains of an injury incurred because its competitors pooled their assets to acquire a facility essential to the survival of a broadcaster and then collaborated to bar Midland from access to that facility, the collaboration resulting in injury to competition by virtue of Midland's forced exit from the market. Since Midland clearly had standing to challenge this collaboration (both in the formation and operation of CCC) under Section 1 of the Sherman Act, it is difficult to see how Midland could be

denied standing to raise the same allegations under the provisions of Section 7.

Petitioners also cite *Jeffrey v. Southwestern Bell Telephone Co.*, 518 F.2d 1129 (5th Cir. 1975). There, consumers of telephone services sued the defendants for conspiracy to destroy competition in the market for telephone equipment. The plaintiffs contended the defendants raised residential rates in order to finance its below cost sales of equipment. The Fifth Circuit held that the consumers had no standing to sue:

> The antitrust conspiracy . . . was aimed at manufacturers, sellers, and lessors of telephone equipment. . . . [A]ppellants are located far from the target area. . . .

Id. at 1131.

Jeffrey might stand for the proposition that the subscribers of Petitioners' cable have no standing. It could not indicate more clearly, however, that a business in Midland's position—like the manufacturer of telephone equipment in *Jeffrey*—does have standing. There being no error in the Court of Appeals' opinion on the standing issue, the writ should be denied.

3. THERE IS NO NEED FOR THIS COURT TO EXERCISE ITS POWER OF SUPERVISION BECAUSE THE COURT OF APPEALS CORRECTLY DECLINED TO RULE ON THE APPLICABILITY OF SECTION 7.

Section 7 of the Clayton Act, was not mentioned in the conclusions signed by the trial court. Thus, the Court of Appeals correctly held that the issue of the applicability

of Section 7 to the facts alleged in this suit was not properly before it on appeal and issued no holding on that point.

It is true that the trial court, in its findings of fact, stated that "the plaintiff does not assert or claim any antitrust injury by reason of the conception or creation of Community Cablevision Company or of its efforts to induce the City Council of Odessa to grant it a franchise, or of the actual granting of such franchise of such city." Brief of Petitioner at A-18. That does not rise to a holding that Section 7 is inapplicable.

Petitioners seem to argue that because the trial court dismissed the entire case, it passed upon Midland's Section 7 contention. Midland respectfully submits that the Court of Appeals should not be taken to task for failing to divine reasons not stated by the trial court for its ruling. This point affords a singularly inappropriate occasion for the exercise of this Court's supervisory power.

Even if the issue were before the Court, Petitioners' position should not be accepted. Section 7 applies to joint ventures. *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964). The three corporations that formed CCC—along with the two individuals—clearly acquired assets of the others in doing so. This is all that is required to meet the plain words of the statute. None of the cases cited to the trial court by Petitioners involve joint ventures with more than a single corporate venturer. Those joint ventures are clearly not covered by the statute, whereas Petitioners' joint venture, comprised as it is of more than one corporation, is unambiguously covered. Plaintiff's Section 7 claim is perfectly valid.

Petitioners also argued to the trial court that this claim is barred by the statute of limitations because the joint venture was formed more than four years before the filing of Midland's complaint. Once again, they are wrong. The statute of limitations does not begin to run until the plaintiff suffers antitrust injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). Each time the joint venture refused carriage of Midland's signal, a new cause of action accrued to it. *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117 (5th Cir. 1975). Those refusals fell well within the limitations period. Midland's claims under Section 7 are therefore not time-barred, and the writ should be denied.

CONCLUSION

Since the decision by the Court of Appeals is in complete harmony with the applicable decisions of this Court and with those of other courts considering similar questions, Midland respectfully urges the Court to decline the invitation to grant a writ of certiorari.

Respectfully submitted,

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APPENDIX

Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Communications Act of 1934, 48 Stat. 1087, as amended, 47 U.S.C. § 313(a):

> All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the

decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court.

47 C.F.R. § 21.712(c) (1967):

(c) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized television broadcast and 100 w or higher power translator stations in the following order of priority, upon request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the station operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system operates, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power.

47 C.F.R. § 74.1103(a) (1967):

No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station;

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational television translator stations operating in the community of the system with 100 w or higher power.

47 C.F.R. § 74.1033(a) (1967):

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power.

47 C.F.R. § 91.559(a) (1967):

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized television broadcast and 100 w or higher power translator stations in the following order of priority, upon request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contour the system operates, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power.

47 C.F.R. § 76.11 (1973):

(a) No cable television system shall commence operations or add a television broadcast signal to existing operations unless it receives a certificate of compliance from the Commission. . . .

(b) No cable television system lawfully carrying television broadcast signals in a community prior to

March 31, 1972, shall continue carriage of such signals beyond the end of its current franchise period, or March 31, 1977, whichever occurs first, unless it receives a certificate of compliance.

(c) A cable television system to which paragraph (b) of this section applies may continue to carry television broadcast signals after expiration of the period specified therein, if an application for certificate is filed at least thirty (30) days prior to the date on which a certificate would otherwise be required and the Commission has not acted on the application.

(d) A certificate of compliance that is granted pursuant to this section shall be valid until the unamended expiration date of the franchise under which the certificated cable television system is operating or will operate, unless the Commission otherwise orders. A cable system may continue to carry television broadcast signals after the expiration of its certificate, if an application for a new certificate is filed at least thirty (30) days prior to the expiration date of the existing certificate and the Commission has not acted on the application.

47 C.F.R. § 76.59(a) (1973):

Provisions for smaller television markets—A community unit operating in a community located in whole or in part within a smaller television market, as defined in § 76.5, shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such community unit may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;

(2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;

(3) Commercial television broadcast stations licensed to communities in other smaller television markets, within whose Grade B contours the community of the community unit is located, in whole or in part;

(4) Television broadcast stations licensed to other communities which are generally considered to be part of the same smaller television market (Example: Burlington, Vermont-Plattsburgh, New York television market);

(5) Television translator stations with 100 watts or higher power serving the community of the community unit and, as to community units that commence operations, or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit. In addition, any community unit may elect to carry the signal of any noncommercial educational translator station;

(6) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.